

TESTIMONY OF THE HONORABLE FRANK C. CARLUCCI
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BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE
SPECIAL SUBCOMMITTEE ON WAR POWERS
ON S.J. RES. 323,
"THE WAR POWERS RESOLUTION AMENDMENTS OF 1988"
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Mr. Chairman, thank you and the distinguished members of the Committee for the opportunity to discuss the War Powers Resolution and the proposed legislation to amend it, S.J. Res. 323. I applaud the sponsors of S.J. Res. 323 as well as the Chairman and Committee members for taking the initiative to address this crucial national security issue.

Fifteen years have elapsed since the War Powers Resolution was passed by the Congress. As meaningful deliberations by the Executive and the Congress on this profoundly important subject have occurred only rarely during this period, I submit that we who now have this opportunity to reconsider the fundamental legal and operational aspects of war powers are duty-bound to be completely candid with each other. We owe as much not only to ourselves and to the public we serve, but to every man and woman who wears the uniform of our military services and faithfully answers to the call of the Commander-in-Chief.

What I have to say today about the War Powers Resolution may displease some members of the Congress. I offer no apology, however, because I will say only what I truly believe. On this subject, perhaps more so than any other, bureaucratic or political self-interest must be set aside, and we must let the unvarnished truth be our guide.

Mr. Chairman, the War Powers Resolution is a failure and should be repealed. Whatever worthy goals it may have been intended to serve have not been served, while in practice, it has directly undermined other important national objectives.

The Committee has already received testimony from Judge Sofaer of the State Department which conveys the legal views of this Administration. I fully and strongly endorse those views. The War Powers Resolution has failed a reasonable test of time, as four Presidents, representing both parties, have judged it to exceed the mandate given to Congress under our Constitution. Rather than recapitulate the Constitutional arguments presented by Judge Sofaer, I will offer a personal view based on my own experience and expertise and my present responsibilities as Secretary of Defense.

Like many members of the Committee, I have served in Washington long enough to acquire some perspective on the War Powers Resolution, both its origins and its track record since 1973. It seems crystal clear from the vantage point of 1988 that the War Powers Resolution was the product of several myths that have since been dispelled.

One myth prevalent in 1973 was that the Presidency had become too powerful, exceeding the intentions of the founding fathers. Looking back on that time, it is now more readily apparent that Presidential ability to exercise discretion over the affairs of the nation has, if anything, declined in recent

decades, as the revolution in communications and information technologies has brought about a level of public and congressional participation in the daily Executive decisionmaking process unimaginable in earlier decades.

A related myth from 1973 is that the Congress, because of the so-called "imperial Presidency," had been powerless to stop the White House from pursuing the Vietnam conflict. This argument was premised on the fact that no Declaration of War against North Vietnam or its allies was ever passed by Congress.

The fact is that the Congress had the power to stop America's military involvement in the Vietnam conflict, using its Constitutional power of the purse, but did not choose to exercise this power to constrain and wind down the U.S. effort until the early 1970s. One need only chronicle the many appropriations bills passed by the Congress in support of our Vietnam operations, and the frequent Congressional visits to South Vietnam during that period, to grasp the reality that Congress, no less than the Executive, lent its Constitutional powers in support of the Vietnam effort.

It is also useful to recall the American public's disaffection and disillusionment with the use of military force by 1973. In voting for the War Powers Resolution, the Congress promoted the view -- a misleading and politically self-serving view, in my estimation -- that an excessive concentration of power in the presidency was to blame for the controversial embroilment in Vietnam.

As the years have passed, Vietnam-era attitudes have evolved with the times. In this decade, Americans have come to appreciate anew that the use of military force can be a prudent, fully legitimate, and successful tool of our national policy, as in Grenada, Libya and the Persian Gulf. But the unhappy legacy of the War Powers Resolution as an attempt by the Congress, in a transitory moment of Presidential vulnerability, to increase its power while decreasing its political responsibility, has stayed with us. Now, thanks to the far-sightedness of those in Congress who are willing to face up to the failure of the War Powers Resolution, including many members of this Committee assembled here today, the Congress may at last correct its misstep by removing this bad law from the books.

Congressional enthusiasts of the War Powers Resolution do not describe it as I have. They cite the desirability of having the President draw upon congressional wisdom as he decides whether to commit U.S. military forces abroad. They also point to the benefit to our nation's foreign policy of having the American people, through their representatives in Congress, endorse a military operation initiated by the President.

I wholeheartedly support both of these objectives. The problem with the War Powers Resolution is that it serves neither. Instead of encouraging the President to seek out the views of Congress, it confronts him by purporting to deny his constitutional authority as Commander-in-Chief of the armed forces

after sixty to ninety days of a military operation. Instead of showing the world the will of the American people, the War Powers Resolution could, according to its terms, implement itself without a single vote being cast in the Congress.

This latter flaw, as much as the unconstitutionality of the War Powers Resolution, offends me and seems particularly out of step with the times. Public preoccupations have changed since 1973. Today the accent in government is on accountability, competence and efficiency, and the immense war powers responsibility places a premium on all three of these objectives.

Accountability is a basic concomitant of war powers. No President can evade full responsibility for the risks and consequences of employing U.S. military force -- nor has any President tried to do so. Franklin Delano Roosevelt was accountable for committing the United States to the war in Europe, as was Harry Truman for defending South Korea. President Eisenhower sent 17,000 Marines into Lebanon, while Kennedy, Johnson and Nixon all accepted the risks and the responsibilities for their decisions in the Vietnam conflict. President Ford did what he felt he had to do in the Mayaguez incident, as did President Carter in the aborted Iran rescue mission. President Reagan has continued this unbroken tradition of full accountability with the actions in Grenada, Libya, Lebanon and the Persian Gulf.

A President would be no less accountable for the risks and consequences of failing to employ force where the defense of the national interest required it. This responsibility is a burden which we put on every President, without exception.

The War Powers Resolution formula, by which Congress could seek to invalidate the action of the Commander-in-Chief after sixty to ninety days through the simple expedient of doing nothing, is the very antithesis of the accountability which lies at the heart of participatory democracy. I believe such a formula shortchanges the American people, who deserve and expect to have their collective will expressed in a time of international duress; and I find it unconscionable that any elected officeholder would seek to participate in the exercise of war powers without full public accountability, when our forces in the field have pledged their very lives and sacred honor to the national interest.

That is why the no-fault formula in the War Powers Resolution, wherein no member of Congress is required to stand up and be counted, is unacceptable. As President Nixon stated in his veto message of October 24, 1973, "[O]ne cannot become a responsible partner unless one is prepared to take responsible action," meaning "full debate on the merits of the issue and... each member taking the responsibility of casting a yes or no vote after considering those merits."

Mr. Chairman, since the debate over war powers arose in the early 1970s, the focus has been almost exclusively on "powers." This time, let us give equal consideration to the subject of "war," for there is much more to this issue than sorting out Executive and Legislative authorities. It does not surprise me that congressional commentary on the subject of war powers invariably emphasizes the importance of congressional support for U.S. military actions; who can deny that the imprimatur of the Congress confers greater legitimacy and force to the acts of the Executive? Certainly not I. But legitimacy, while necessary, is not the only factor involved in the government's responsibility to preserve the national interest.

Efficiency and competence are also central to the mission of government. The framers of the Constitution recognized this when they created the Executive, which has its own unique and vital purpose. In the framers' language, the prime characteristic of the Presidency is "energy," or the capacity for prompt action. The Congress, by its very design, is not capable of effective executive action.

When U.S. military force must be used, the American people not only want the action to be legitimately authorized -- they also want it to succeed. They want the tactical military objective to be accomplished with a minimum loss of life, and they want the underlying foreign policy purpose to be served by that action.

The successful employment of U.S. military forces may hinge upon the ability to act quickly. What we must do to defend our national and international interests is governed to a great extent by external forces and events over which we have no control and which seldom wait for us to act. Yet, for sixty to ninety days, or longer, the War Powers Resolution would leave in suspense the question of whether a military deployment was authorized.

Think about the factors upon which success may depend: high morale of our forces; high confidence in our resolve on the part of our allies; and -- most of all -- the perception on the part of our adversaries that the United States has the willpower, the means, and the intention to achieve our goals despite their opposition.

I cannot overstate the importance of this last objective -- convincing our adversaries that we as a nation intend to prevail on whatever point of contention has placed us at odds. Military strategists from Sun Tsu to Clausewitz to Admiral Bill Crowe all agree that the most successful battle is the one which never needs to be fought because one's adversary recognizes the futility of further confrontation.

Yet look at the signals the War Powers Resolution would have America send to allies and adversaries alike at the critical moment when our national resolve is being measured abroad. The first thing a President is asked to do is judge

whether hostilities are imminent. If he says "yes," he is breaking a cardinal rule of military strategy by forfeiting the advantage of tactical surprise. One can only imagine the casualties Israel might have sustained in June 1967 had Prime Minister Golda Meir been obliged to engage in extensive War Powers consultations with the Knesset signalling Israel's imminent preemptive attack upon neighboring forces which it knew were poised to assault Israel.

If the President expresses the judgment that hostilities are not imminent -- assuming, as I do, that Presidents would report truthfully to the Congress even while forfeiting another key military advantage, that of deception -- our adversaries can breathe more easily. They know from the experience since 1973 that the Executive-Legislative disagreement over the War Powers Resolution slows down the decisionmaking process in Washington and renders major tactical military surprises by the United States almost inconceivable.

The sixty-day deadline, extendable to ninety days, is the feature of the War Powers Resolution formula most debilitating to the pursuit of strategic success in an exigent situation. The very notion of setting deadlines, however short or lengthy, plants seeds of doubt in the minds of our own forces as to whether their acts of courage are backed by their own nation. It plants seeds of doubt in the minds of our allies as to whether they should join in our military operational efforts,

or wait to see whether War Powers disagreements in Washington will unravel the President's approach to a problem abroad.

Deadlines constrain our military planners from fashioning an optimal response to the threat. One wonders whether President Kennedy would have regarded a naval blockade as a viable option in the Cuban Missile Crisis had the War Powers Resolution deadlines and reporting requirements been in existence. Kennedy's misgiving would have had nothing to do with the Congress; obviously, all Americans rallied around their President in that terrible confrontation. Rather, he would have had to concern himself with Nikita Khrushchev's perceptions about the War Powers Resolution.

In my view, we are fortunate that no such thing existed in October 1962. In those tense circumstances, the White House wisely left it entirely to the Kremlin's imagination and intelligence capability to judge what sorts of forces the United States was deploying, where, how they were armed, their mission and rules of engagement, whether we anticipated hostilities, and how long we intended to maintain our escalated force posture.

Americans are, to put it mildly, gratified that President Kennedy prevailed in that test of wills -- that the other side "blinked" first. It is a mystery to me that anyone could expect a future President to engage successfully in a similar test of wills under the ticking clock of the War Powers Resolution deadlines, when an adversary could reasonably conclude that the

United States is unilaterally pre-programmed to "blink" after sixty days of a deployment of forces.

The plain fact is that whether the challenge to our security takes the form of nuclear brinkmanship, armed conflict, terrorism or any other type of threat to our national interests, deadlines simply encourage adversaries to wait us out until our own political system accomplishes for them what their own forces or terrorists could never achieve.

Nor is the problem with deadlines a matter of their length. It took, after all, several decades for the Ayatollah Khomeini and his clerical comrades to seize power in Iran. Khomeini himself waited in exile for fourteen years before settling his score with the Shah. When the United States initiated the reflagging operation in the Persian Gulf, the threat in the Gulf to U.S.-flag shipping, international commercial traffic and the security of Gulf states friendly to the United States emanated from the Iranian regime. Given the Ayatollah's mindset, any sort of self-imposed deadline on the enhanced U.S. Navy presence in the Gulf -- whether days, months, or years -- would surely have been self-defeating.

Indeed, the formula of the War Powers Resolution was entirely incompatible with the needs of the United States in its Persian Gulf deployment strategy. The purpose of increasing our forces was not to engage in hostilities, but to deter them. Had we imposed a deadline on the reflagging operation at the

outset, the Kuwaitis might well have invited the Soviet navy to take up a major role in the Persian Gulf for the first time. The British, French, Dutch, and Belgians might well have refrained from following our leadership in providing naval protection to shipping in the Gulf.

Most of all, the regime in Teheran might have held off from its historic decision to end its war with Iraq, believing that if it only waited for the Americans to reach their time limit, it would again be able to exert effective pressure on the Gulf Arab states and weaken Iraq's leverage.

Thank goodness everything came out as it did. Our allies and adversaries believed us when we pledged that the United States would not back away from the defense of its national interests; and today, there is the hope of peace in the Gulf region.

Now let us recall how the U.S. Congress responded to the President's actions. In October 1987, the Senate debated a resolution concerning our policy in the Gulf. The resolution which passed, after initially being defeated, did nothing more than to schedule a Senate vote again several months later on a resolution not yet written. Senator Bumpers said that this resolution had been carefully designed "to do nothing."

In the House of Representatives, meanwhile, 110 members attempted to sue the President, claiming he had not fulfilled

his obligations according to the War Powers Resolution. On December 18, 1987, Judge George H. Revercomb of the U.S. District Court for the District of Columbia dismissed the suit, saying, "The President must have flexibility in executing military and foreign policy on a day-to-day basis."

Had the 110 members of the House of Representatives been able to persuade a total of two-thirds of the House and Senate of their position on the President's Persian Gulf policy, there would have been no reason to solicit support from the courts. As Judge Revercomb stated when he dismissed their suit, their action was a "byproduct of political disputes within Congress;" and for him to rule on the issue would have been to "impose a consensus on Congress" that it had not achieved on its own. Congress, he said, is "free to adopt a variety of positions on the War Powers Resolution, depending on its ability to achieve a political consensus."

Mr. Chairman, I believe that fifteen years of experience with the War Powers Resolution is enough to see that it is incompatible with the Constitutional scheme set out by our founding fathers. The Executive branch, by design, is a hierarchy, ultimately responsive to a single Commander-in-Chief elected by all of the people. It alone is capable of immediate, clear, coherent and consistent action. The Legislative branch, by design, brings 535 independent actors into a deliberative process which hears the voices of Americans everywhere on every issue.

There is nothing deficient in Congress' Constitutional power of the purse, as every Executive agency head knows from painful experience. Schemes to inhibit the Constitutional powers of the President, or to substitute self-enforcing legislative mechanisms for the exercise of responsible leadership, only serve to obscure the real source of many members' frustration -- namely, their inability to persuade their own colleagues to agree with them and to vote with them.

When the American people overwhelmingly and strongly believe that the President's policy must be reversed, the Congress will reverse it. The simple test of whether the American people genuinely hold to this view is to count the votes in Congress. If the votes are not there, neither is the popular mandate.

A former Chairman of the Senate Committee on Foreign Relations, the late Senator Frank Church, offered some candid observations about the War Powers Resolution in a hearing much like this one held in July of 1977. An original supporter of the legislation, he subsequently came to doubt the utility of such a statute. Senator Church gave the following explanation for his change of mind:

"First, if the President, as Commander-in-Chief, uses the Armed Forces in an action that is both swift and successful, then there is no reason to expect the Congress to do anything other than applaud.

"If the President employs forces in an action which is swift, but unsuccessful, then the Congress is faced with a fait accompli, and although it may rebuke the President, it can do little else.

"If the President undertakes to introduce American forces in a foreign war that is large and sustained, then it seems to me that the argument that the War Powers Resolution forces the Congress to confront that decision is an argument that overlooks the fact that Congress in any case must confront the decision, because it is the Congress that must appropriate the money to make it possible for the sustained action to be sustained.

"So I wonder really whether we have done very much in furthering our purpose through the War Powers Resolution. I say that very respectfully because I appreciate the difficulty, and I also fully supported the motive....

"I think that this whole exercise is something like trying to count how many angels can stand on the head of a pin. It is elaborately interesting and absorbing from a lawyer's point of view, and certainly is a good subject for a lot of learned writing in the constitutional field; but, as a practical matter, I think it is going to come down to the arena of politics and the tug of war between the two branches in the self-assertion of their two powers. There is no neat formula that can accommodate the needs of the future in this respect."

That is why I believe that the most prudent step the Congress can take to clarify the issue of war powers and to maximize the effective and legitimate exercise of authority by all three branches of government is to repeal the War Powers Resolution and return to the only formula I know of which will withstand the test of time, namely the Constitution.

Mr. Chairman, I recognize that the Committee is interested in exploring the merits of specific proposals embodied in S.J. Res. 323. Although I see no necessity for war powers legislation,

I will comment briefly on aspects of the proposed legislation for the record, again emphasizing that I fully endorse the Administration's legal views that have already been provided.

Section 3 contains a proposal for an 18-member consultative group. My record demonstrates my strong commitment to close consultation between the branches. I also believe, however, that the Executive is entitled to maintain the integrity of its own deliberative process, just as Committees of Congress frequently mark up their bills and hold conference sessions behind closed doors.

That said, for the sake of better consultation I hope that the Congress will begin to look closely at the need to streamline its own internal management in the field of foreign affairs and national security. Thirty years ago, a President or Cabinet member could consult with a mere handful of senior members of Congress and be assured that their positions and pledges would be upheld, and their confidences maintained, within the halls of Congress. Those days are gone, as the Congress has expanded the committee system and given far greater voice to all members, regardless of seniority.

I think the broadening of responsible participation in Congress was a good thing. One consequence, however, has been that the Executive has never been certain whether a given Member or Committee of Congress was speaking for the whole.

From a management standpoint, this has led to uncertainty in the Executive as to how much consultation is enough on any given issue. It has frequently led to tremendous duplication of effort, as several Executive departments or offices have been asked by different Members or committees to provide similar testimony, briefings, written reports and responses to the same questions.

Usually, this inefficiency is regrettable but tolerable, and can be viewed as the price of having coordinated policy between the branches. But in a crisis, when the President must act and the reactions of our adversary must be monitored, analyzed and factored into the U.S. effort on a real-time basis, open-ended and duplicative reporting requests from all quarters on Capitol Hill can be a difficult burden on the senior policymakers and experts in the Executive branch.

It is an unfortunate irony, in this regard, that those situations which most urgently require the Executive branch to focus its finite energies on a national security problem tend to stimulate the greatest volume of congressional requests for high-level testimony and written submissions from the Executive branch. Because I believe that success of our national strategy in a crisis requires efficiency and competence, I hope that the Congress will take this into account in the future.

As to the feasibility of contacting or assembling an eighteen-member group in a crisis, it is a virtual certainty

that in many situations this would not be feasible. My rule of thumb would be that the President will make best efforts at all times to consult adequately with the Congress, recognizing that no single format is likely to be satisfactory.

Section 4(a)"(c)" would purport to give any member of Congress standing in a court of law to obtain an injunction against the President's policy. This proposal seems to me utterly inconsistent with the system of government set out by the founding fathers. Bluntly stated, if a member of Congress cannot persuade his own branch of the government to vote as he desires, there is no justification for enabling him to bring another branch into the process. Obversely, if a member can persuade the Congress to vote as he desires, he will have no incentive to involve the courts.

As I have said, the Constitution already gives the Congress ample power to assert its collective will. There is only one requirement: it must have a collective will. The authors of S.J. Res. 323 would appear to have recognized this when they drafted Section 6, requiring a majority of both Houses to pass a joint resolution of disapproval which, if vetoed by the President, would then require two-thirds of both Houses to become law.

Section 5 contains prohibitions on the use of funds. I would like to state for the record my complete agreement with

Judge Sofaer's statement that the power to control spending cannot properly be used to interfere with the President's discretion over the actual conduct of military operations, such as by ordering the President to conduct a particular type of military operation in a specific manner. If the policy direction charted by the President is definitively rejected by the Congress -- even when Congress overrides his veto -- the President still retains his powers and responsibilities as Commander-in-Chief to determine the most prudent and effective way, in operational military terms, to give effect to the new policy direction mandated by Congress.

Section 5 also purports to give Congress the power to place future occupants of the House and Senate on collective "auto-pilot" by enjoining them from funding activities inconsistent with any aspect of war powers-related legislation already on the books. This strikes me as curious, if not naive. A central flaw of the War Powers Resolution was its attempt to preordain legislative action thenceforth, at the expense of responsible contemporaneous action by the sitting members. Surely the authors of S.J. Res. 323 do not wish to repeat the mistake.

The presumption, embodied in Section 6, that a Presidential action to deploy U.S. forces is authorized unless and until Congress takes effective action to alter that policy, is correct. As the Constitution already makes that presumption, only a

Constitutional amendment could change it. The President does not require this or any other statute to authorize him to exercise his Article II powers as Commander-in-Chief.

Although Section 6 deals with internal congressional procedures to consider joint resolutions, there is one aspect to this provision which may reflect a lack of realism about the ability of Congress to participate as we all would like it to in decisions to employ U.S. forces. I refer to the proposed time limits, measured in minutes, hours, and calendar or session days, which are to govern congressional deliberations on these matters.

Mr. Chairman, I have not added up the minimum time it would take both Houses to vote against a Presidential action and override his veto under the terms of S.J. Res. 323. But I do know that in the event of a warning of nuclear attack, a President would not be able to wait twenty hours before issuing orders to U.S. forces; he might only have twenty minutes, if that much time, to respond.

The nuclear scenario is not just a rare exception meriting an asterisk in the grand catalogue of war powers exigencies. My in-basket is frequently graced with reports showing that the threat environment of the future will include deadly conventional, chemical, space-based, and even more exotic technological threats which will afford very short warning times to the President.

National security analysts are heard from time to time exhorting the Pentagon's planners not to fight "the last war." This advice is particularly germane to the issue now before the Congress, as I am certain no member intends to advocate passage of a law which is transparently obsolescent. If we are serious about revisiting the ground rules for Executive-Legislative action relating to war powers, we must be realistic about the likely nature of "war" in the years, decades and centuries ahead.

Having tried to do so myself, I have come to the conclusion that no conceivable statutory scheme regarding war powers can improve on what we have had all along: an Executive which can act, plan, command and manage efficiently and successfully; and a Legislature which can use the power of the purse both to steer the broad direction of national policy and to terminate any Executive endeavor requiring an appropriation of funds to which the American people overwhelmingly object.